

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re

CLASSMATES.COM CONSOLIDATED
LITIGATION

CASE NO. C09-00045-RAJ

ORDER REGARDING STATEMENT RE
FEE REQUEST
[PROPOSED]

CLASS ACTION

**NOTED ON MOTION CALENDAR:
Friday, January 27, 2012**

Pursuant to the Court's order from the bench at the fairness hearing of December 15, 2011, Objector Professor Michael Krauss ("Krauss") has filed a Statement regarding Attorneys' Fees and Objector Michael Langone ("Langone") has filed a Request for Attorneys' Fees. The Court has reviewed the Revised Class Action Settlement Agreement and the December 7, 2011 Amendment thereto (hereinafter jointly "Settlement" or "Settlement Agreement"), as well as all files, records, and proceedings to date in this matter, and is fully advised as to the issues presented.

The Court finds as follows:

1. The objections of Krauss and Langone materially improved the settlement. Class counsel proposed a settlement that would pay \$52,000 in cash to the class. After a fairness hearing, this Court rejected that settlement. (Dkt. No. 128.) Krauss's counsel's participation in the fairness hearing refuted the settling parties' argument that the silence of the class constituted consent to an unfair settlement, and his substantive objection correctly identified the flaws in the original agreement. Krauss's objection to the modified settlement resulted in the December 7,

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2011 Amendment that ended the “kicker” that would have reverted denied attorneys’ fees to the defendant. *Cf. In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). As a result, the settlement now consists of a common fund of \$3.55 million instead of \$52,000 for the class.

2. It is appropriate to give joint credit to the class counsel and the objectors for this \$3.5 million difference. *In re Prudential Ins. Co. of Am.*, 273 F. Supp. 2d 563, 572 (D.N.J. 2003), *aff’d* 103 Fed. Appx. 695, 697 (3rd Cir. 2004) (awarding objector 1.4% of class counsel’s fee award for objection that was responsible for 1.4% of class recovery); *Larson v. Sprint Nextel Corp.*, 2010 WL 234934 at *28 (D.N.J. Jan 15, 2010) (awarding objectors’ attorneys 4.4% of attorneys’ fee award for providing 4.4% of total class benefit). *See also Lan v. Ludrof*, 2008 WL 763763 at *28 (W.D. Pa. Mar 21, 2008) (awarding objector 25% of the increase in the benefit to the class); *Howes v. Atkins*, 668 F. Supp. 1021, 1027 (E.D. Ky. 1987) (court awarded 10% of the total fund to objectors’ counsel).

3. The Ninth Circuit has a 25% benchmark for attorneys’ fees in class action settlements. *Bluetooth, supra*. Under normal circumstances, it would be appropriate to award \$875,000 to class counsel, and instruct class counsel to distribute \$175,000 of that award to counsel for Langone and \$175,000 to counsel for Krauss, reflecting the objectors substantial contribution in turning a settlement that provided \$52,000 in cash to the class into a settlement that provided \$.

4. However, there are two unusual circumstances in this case. *First*, Krauss has not requested fees and instead asks that his \$175,000 share, reflecting a 5% percentage of the benefit created, be distributed to the class. The Court grants that request.

5. *Second*, class counsel has taken the position that the decision *In re Mercury Interactive Sec. Litig.*, 618 F. 3d 988 (9th Cir. 2010), required the objectors, and anyone seeking fees from the class, to provide extensive documentation of the structure of their firms, contracts with their attorneys, their attorneys’ contracts with their employers, and portfolio composition.

1 This Court is skeptical that such materials are relevant to a fee request; indeed, class counsel did
2 not disclose any of this information to the class in their fee request. Moreover, *Mercury*
3 *Interactive*, on its face, applies only to class counsel fees; not only is that consistent with the plain
4 language of FRCP 23(h), but *Mercury Interactive* bases the need for disclosure to the class on the
5 conflict of interest between the class and the class's attorneys in a fee request, and no such conflict
6 exists when an objector seeks fees. 618 F.3d at 993-95.

7 6. However, it is unquestionably the case that class counsel has benefited from that
8 position by coercing Krauss to withdraw his fee request rather than comply with a burdensome
9 subpoena. Class counsel is thus judicially estopped from claiming that they have complied with
10 the minimum requirements of Rule 23(h) and *Mercury Interactive*. A party is not permitted to
11 benefit from a legal position in one part of the case, and then deny its effect in another part of the
12 same case. *New Hampshire vs. Maine*, 532 U.S. 742 (2001). I therefore find that class counsel has
13 waived their right to seek fees.

14 7. The Court, however, has the power of equity to do complete justice and
15 nevertheless award fees. *Northwest Environmental Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d
16 668, 680 (9th Cir. 2007); *Reebok Int'l, Ltd. v. Marnatech Ent., Inc.*, 970 F.2d 552, 561-62 (9th Cir.
17 1992). Class counsel is entitled to some recovery for the benefit created, though I will exercise my
18 discretion to reduce their fee request in light of their abusive conduct in this case and their
19 multiple attempts to impose unfair settlements upon the class.

20 THEREFORE, the Court hereby ORDERS, ADJUDGES AND DECREES that Langone's
21 and Krauss's Motions for Fees are hereby GRANTED, and Class Counsel's Motion for Fees is
22 hereby DENIED. Class Counsel shall be awarded \$525,000 in attorneys' fees. Langone is entitled
23 to \$175,000 in attorneys' fees, to be paid by Class Counsel.

IT IS SO ORDERED.

DATED this ____ day of _____, 2012.

THE HONORABLE RICHARD A. JONES
UNITED STATES DISTRICT COURT JUDGE

Presented by:

/s/ Daniel Greenberg
Daniel Greenberg (*pro hac vice*)
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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 13th day of January, 2012.

/s/ Marcia A. Ripley
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